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ACTIONS ARISING OUT OF INJURY TO BOTH PERSON AND PROPERTY.

Where a person is injured physically and his property is also injured by the same wrongful act, does there arise but one cause of action for damages, or are there separate and independent causes of action, one for the injury to the person and another for the injury to the property? It is, perhaps, less surprising that the courts have given discordant answers to this question than that its discussion should have been deferred to times usually assumed to be out of sympathy with subtle distinctions in the art of pleading; the leading English case follows the Judicature Act by a decade, the leading American cases belong to the Twentieth Century. Nevertheless there is a conflict of authority which discloses an interesting procedural problem and compels an analysis of the primary elements of a cause of action.

The question usually arises in one of two ways, either upon an objection to a declaration, or statement of claim, for misjoinder of causes of action, or duplicity, or upon a plea of *res judicata* to a second suit. While the basic principles involved may be the same, the situation of the parties, upon the merits, may be quite different in these two stages of the proceedings. The dual aspect of the problem is, no doubt, to be regarded as, in part at least, explanatory of the *ratio decidendi* in some instances.

In considering the subject there are certain elementary principles of the common law to be taken into account. In the first place, as Sir Edward Coke observes, it is "a rule of law that a man shall not be twice vexed for one and the same cause"¹ In *Fetter v. Beale*,² the defendant had committed an assault and battery upon the plaintiff by beating his head upon the ground for which the latter recovered £11. Afterwards a piece of his skull came out and he brought an action, for the additional damage, to which the defendant pleaded former recovery. Judgment was given for the defendant on demurrer, Chief Justice Holt saying that it was a new case, not in the books, but that the battery was the foundation of the action and the jury must be presumed to have given damages for all the hurt the plaintiff had suffered. The Chief Justice remembered trying the first case eight years before, when the plaintiff and defendant appeared to be both in drink, and the jury, not knowing which was in fault, gave small damages.

Upon the same principle, it is said in *Farrington v. Paine*,³ "Suppose a trespass, or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?" So, after judgment for the conversion of chattels, an action cannot be maintained for the conversion of other chattels taken by the same act, but accidentally omitted in the former action.⁴ An entire claim, whether in contract or tort, cannot be divided and made the subject of several suits, and if several suits be brought for different parts of such a claim, the pendency of

¹ *Sparry's Case*, 5 Rep. 61 (1590), distinguishing *Y. B. 5 Hen. VIII*, 15 from *Y. B. 20 Hen. VI*, 44; *Y. B. 22 Hen. VI*, 15; *Y. B. 22 Hen. VI*, 52; *Y. B. 14 Hen. VII*, 12. See also *Y. B. 12 Edw. IV*, 13; *Ferrer's Case*, 6 Rep. 9 (1598); *Higgen's Case*, 6 Rep. 45 (1606).

² *Salkeld*, 11 (1701), s. c. 1 *Ld. Raym.* 339, 692. See *Whitney v. Clarendon* 18 *Vt.* 252 (1846); *Howell v. Goodrich*, 69 *Ill.* 556 (1873).

³ 15 *Johns. N. Y.* 432 (1818). See also, *Watson v. Norbury*, *Style*, 201 (1649); *Bendernagle v. Cocks*, 19 *Wend. N. Y.* 207 (1838); *Secor v. Sturgis*, 16 *N. Y.* 548 (1858); *Bennett v. Hood*, 83 *Mass.* 47 (1861); *Bethlehem G. Co. v. Yoder*, 112 *Pa.* 136 (1886); *Hill v. Joy*, 149 *Pa.* 243 (1892); *Wheeler Savings Bank v. Tracy*, 141 *Mo.* 252 (1897); *Baird v. United States*, 96 *U. S.* 430 (1877); *Stern v. Riches*, 111 *Wis.* 591 (1901); *Eller v. Railroad*, 140 *N. C.* 140 (1905). Compare *Missouri P. R. Co. v. Scammon*, 41 *Kan.* 521 (1889).

⁴ *Folsom v. Clemence*, 119 *Mass.* 473 (1876); *Cunningham v. Harris*, 5 *Cal.* 81 (1855); *O'Neal v. Brown*, 21 *Ala.* 482 (1852); *McCaffery v. Carter*, 125 *Mass.* 330 (1878); *Sullivan v. Baxter*, 150 *Mass.* 261 (1889).

the first suit may be pleaded in abatement of the others, or a judgment upon the merits in either will be a bar in the other suits.

Nor in personal actions, was one who had suffered more than one injury of the same character compelled to bring a separate suit for each wrong. "A man," says Fitzherbert, "may have one writ of trespass for divers trespasses, as for breaking of his close, cutting of his trees, fishing in his ponds, beating of his servants and taking of his goods and chattels, and all in one writ."⁵ So also in trespass on the case.⁶ In fact the general rule of the common law was that several causes of action of the same nature, between the same parties, in the same right and character, might be joined, by several counts, in one declaration.⁷ In the definition of the phrase "of the same nature" the cases were not always consistent, but the ordinary test applied by the courts was to inquire whether the same plea might be pleaded and the same judgment given upon all the counts of the declaration. Unless this question could be answered in the affirmative the counts could not be joined.⁸ If, therefore, the proper distinction between causes of action in the nature of trespass and in the nature of case was observed, no objection seems to have been made on the ground that the respective injuries were to the person and the property of the plaintiff. In *Arnold v. Maudlin*,⁹ counts for trespass *quare clausum fregit* and for assault and battery were joined. In *Ditcham v. Bond*,¹⁰ the plaintiff declared in the first count for

⁵ Fitzherbert's *Natura Brevium*, 86; Y. B. 29 Ass. 35; *Courtney v. Collet*, 1 T. Raym. 272 (1697).

⁶ *Mast v. Goodson*, 3 Wils. 348 (1772); *Brown v. Dixon*, 1 T. R. 274 (1786); *Whitney v. Haskell*, 216 Pa. 622 (1907) (*assumpsit*).

⁷ Will's *Gould on Pleading*, 392; *Comyn's Dig. Actions G.*; *Bacon's Abr. Actions C.*; Y. B. 8 Edw. IV, 5; *Buckmere's Case*, 8 Rep. 87b (1609); *Champernon v. Hill*, Cro. Jac. 68 (1604); *Gillam v. Clayton*, 3 Lev. 93 (1682).

⁸ 1 Chitty on Pleading (16 ed.) 222; Trespass and case could not be joined because they required different judgments, the former a *capiatur*, the latter a *misericordia*. Trespass could not be joined with *assumpsit*, as they required different general issues. *Drake v. Cooper*, Carth. 113 (1691); *Vincent v. Fursy*, Style, 43 (1645); *Allways v. Broom*, 1 Ld. Raym. 83 (1696); *Taylor v. Holmes*, T. Raym. 233 (1673); *Sharpe v. Bechenowe*, Lutw. 1249 (1688); *Baker v. Dumbolton*, 10 Johns. N. Y. 240 (1813); *Bull v. Matthews*, 20 R. I. 100 (1897); *Wilkins v. Standard Oil Co.*, 71 N. J. L. 399 (1904); *Marley v. Slaw*, 82 Atl. 89 (Del. 1911).

⁹ 6 Blackf. Ind. 187 (1842). *Accord Flinn v. Anders*, 9 Iredell's Law Rep. 328 (1849).

¹⁰ 2 M. & S. 436 (1814).

breaking and entering his dwelling house, in the second and third for assaulting and beating him, and in the last for beating his servant. No question was raised upon the joinder of the first three counts and even the joinder of the fourth which sounded in case was sustained as according with ancient precedent.¹¹

That legislation directed to the correction of one evil frequently brings in its train new difficulties is as true in procedure as in other branches of the law. Connecticut, in 1836, provided by statute that one or more counts in trespass on the case might be joined with counts in trespass when all were for "the same cause of action." In *Boerum v. Taylor*,¹² the plaintiff declared in two counts; one in trespass for putting filthy substances in a jug of rum whereby the rum was spoiled; the other in case for the injury to the plaintiff who drank of the mixture and was thereby made ill. The Court held that these counts were not for the same cause of action. The act complained of resulted in injury to property, as its direct result, and injury to the health of the plaintiff, as an indirect result; "the evidence which would sustain the first count would fall far short of sustaining the second." It was intimated that by proper averments the plaintiff might have recovered under the first count for the injury described in the second, by way of aggravation. Almost contemporaneous with the above was the case of *Howe v. Peckham*¹³ in the Supreme Court of New York. The plaintiff sued the defendant for negligence in permitting his team to run away, whereby the plaintiff, his horse and his wagon were run over and injured. The defendant demurred on the ground that the com-

¹¹ *Guy v. Livesey*, Cro. Jac. 501 (1618). In *Bird v. Snell*, Hob. 249 ejectment and trespass for assault and battery were joined, and, after verdict, the court "advised of judgment because it was without precedent." In actions of trespass *vi et armis* it was not uncommon for the plaintiff to recover damages, by way of aggravation, for that which alone considered would have furnished a good cause of action in case. *Anderson v. Buckton*, 1 Str. 192 (1719); *Bracegirdle v. Orford*, 2 M. & S. 77 (1813); *Treat v. Barber*, 7 Conn. 274 (1828); *Barnum v. Vandusen*, 16 Conn. 200 (1844).

¹² 19 Conn. 122 (1848). Followed in *Havens v. Railroad*, 26 Conn. 220 (1857), distinguished *Belden v. Grannis*, 27 Conn. 511 (1858), and see *Seger v. Barkhamsted*, 22 Conn. 290 (1853); *Winnier v. Pond*, 34 Conn. 391 (1867).

¹³ 6 How. Pr. 229 (1851) s. c. 10 Barb. 656. Compare *Ehle v. Huller*, 10 Abb. Pr. 287 (1860). As will appear *infra*, *Howe v. Peckham* must be regarded as overruled.

plaint contained two distinct causes of action, to-wit: injuries to the person and property of the plaintiff, in violation of Section 167 of the Code of Procedure.¹⁴ But the court held that the injury resulted from one negligent act, and constituted but one cause of action in which the plaintiff recovered his damages as well for his personal injury as for the injury to his property. In accord with *Howe v. Peckham* are decisions in Maryland,¹⁵ Vermont and Missouri¹⁶ and these are the only cases of importance prior to the decision of the English Court of Appeal, next to be considered.

In *Brunsdon v. Humphrey*¹⁷ the plaintiff brought an action in a county court to recover for damage done to his cab in a collision caused by the negligence of defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High Court against the defendant, claiming damages for personal injury sustained through the same negligent act, accounting for his delay by alleging that it was not until some time after the accident that he found he had been seriously hurt. After verdict for plaintiff, a rule for judgment for the defendant was made absolute on the ground that the action was not for a new wrong but for a consequence of the same wrongful act which was the subject of the former suit. On appeal judgment was reversed and the judgment on the verdict for plaintiff restored. The Master of The Rolls said that the causes of action were distinct and therefore they were not called upon to apply the doctrine of *res judicata*, a rule of law often harsh in its result. It was suggested that different evidence would be required to support the respective claims for injury to the property and person of the plaintiff, and upon this point Lord Justice Bowen adds: "In the

¹⁴ Under the code of procedure at the time of its original enactment, injuries to person and to property were separately classified (§167). By an amendment of 1852 both were put in the same class. By section 484 of the present code of civil procedure they are again placed in distinct classes.

¹⁵ *Baltimore & O. R. Co. v. Ritchie*, 31 Md. 191 (1869).

¹⁶ *Hodge v. Town of Bennington*, 43 Vt. 450 (1871); *Von Fragstein v. Winder*, 2 Mo. App. 598 (1876), followed in *Lamb v. St. Louis C. & W. Co.*, 33 Mo. App. 489 (1888).

¹⁷ L. R. 14 Q. B. D. 141 (1884), Brett, M. R., Bowen, L. J., with Coleridge, C. J., dissenting. Reversing 11 Q. B. D. 712 (1883), Pollock, B., and Lopes, J. Referred to in *Darley M. Co. v. Mitchell*, L. R. 11 App. Ca. 127 (1885); *Donegan v. Neill*, 16 Irish L. R. 309 (1885); *Macdougall v. Knight*, L. R. 25 Q. B. D. 1 (1890).

one case the identity of the man injured and the character of his injuries would be in issue, and justifications might conceivably be pleaded as to the assault, which would have nothing to do with the damage done to the goods and chattels."¹⁸ The value of this test, however, is illusive, when the purpose rather than the nature of the evidence is considered. Is it offered to prove the invasion of distinct primary rights or the injurious consequences flowing from a single wrong? We are thrown back to the definition of the wrong before the scope of the evidence can be decided. The heart of the problem is reached by Lord Justice Bowen in the question, "What is the gist of the action?" And, conceding the difficulty of the case, and the lack of authority, he presents very forcefully the view of the majority of the court.

"Without remounting to the Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made, either by judges or juridical writers, of the terms '*injuria*' and '*damnum*,' it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. * * * Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which (if no damage had ensued) would have been legally unimportant."¹⁹

Lord Chief Justice Coleridge dissented.

"It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the tech-

¹⁸ "One great criterion of this identity is, that the same evidence will maintain both the actions." Per De Grey, C. J., in *Hitchin v. Campbell*, 2 Wm. Bl. 827 (1772); *Seddon v. Tutop*, 6 T. R. 607 (1796); *Gates v. Goreham*, 5 Vt. 317 (1833); *Boerum v. Taylor*, *supra*.

¹⁹ In the next sentence the Lord Justice is guilty of something very much like a bull. "It certainly would appear unsatisfactory to hold * * * that an action under Lord Campbell's Act by the widow and children of a person who has been killed in a railway collision, is barred by proof that the deceased recovered in his lifetime for the damage done to his luggage."

nical cause of action, equally the cause of action is one and the same: that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect to different rights, *i. e.*, his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured, his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn."

The case does not decide that it would have been improper to join the two causes of action in one suit;²⁰ on the contrary it declares that the High Court has power to prevent vexation and oppression in the splitting of demands by staying proceedings or apportioning costs. And indeed, subject to certain exceptions not germane to this discussion, the modern English rules permit a plaintiff to unite in the same action several causes of action, subject to the power of the court to order separate trials of such causes as cannot be conveniently disposed of together.²¹

In the United States, the courts in several recent cases have had occasion to examine the reasoning in *Brundsen v. Humphrey* and their conclusions are not in harmony. The most important decision in accord with the English doctrine is *Reilly v. Sicilian Asphalt Paving Co.*²² by the New York Court of Appeals. There, the plaintiff on the trial in the Supreme Court of an action for

²⁰ In the appendix to the rules of the Supreme Court (Ann. Pr. 1910, Vol. II, p. 66) there is a prescribed form of a statement of claim, designed to meet the very facts of *Brundsen v. Humphrey*, as follows:

No. 3.

(*Negligent Driving*).

The plaintiff has suffered damage from personal injuries to the plaintiff and damages to his carriage, caused by the defendant or his servant on the 15th of January, 1899, negligently driving a cart and horse in Fleet street.

Particulars of Expenses, &c.

| | £. | s. | d. |
|----------------------------------|-----|----|----|
| Charges of Mr. Smith, surgeon | 10 | 10 | |
| Charges of Mr. Jones, coachmaker | 14 | 5 | 6 |
| | £24 | 15 | 6 |

The plaintiff claims £150.

(Signed)

DELIVERED.

²¹ Rules of Supreme Court, Order 17 rules 8 & 9. *United T. Co. v. Tasker*, 59 L. T. 852 (1888); *Universities of Oxford & Cambridge v. Gill*, L. R. (1899) 1 Ch. 55; *Saccharin Co. v. Wild*, L. R. (1903) 1 Ch. 410.

²² 170 N. Y. 40 (1902) reversing 31 N. Y. App. Div. 302. See also 14 N. Y. App. Div. 242 (1897).

personal injuries, sustained through the collision of his vehicle with a heap of gravel placed on the road through defendant's negligence, was met by the defence of a former recovery in the District Court where he had sued and recovered for the injury to the vehicle. Judgment was entered for the defendant and the plaintiff appealed. The question, said Cullen, *J.*, in delivering the opinion of the court, was not determined by the code, which, while prescribing what separate causes of action might be joined, nowhere assumed to define what was a single cause of action. As for the respective arguments advanced by advocates of a single or of a double cause of action, neither theory seemed conclusive.

"If, while injury to the horse and vehicle of a person gives rise to but a single cause of action, injury to the vehicle and its owner gives rise to two causes of action, it must be because there is an essential difference between an injury to the person and an injury to property that makes it impracticable or, at least, very inconvenient in the administration of justice to blend the two. We think there is such a distinction. Different periods of limitation apply. The plaintiff's action for personal injuries is barred by the lapse of three years; that for injury to the property not till the lapse of six years. The plaintiff cannot assign his right of action for the injury to his person, and it would abate and be lost by his death before a recovery of a verdict, and if the defendant were a natural person, also by his death before that time. On the other hand, the right of action for injury to property is assignable and would survive the death of either party. It may be seized by creditors on a bill in equity, and would pass to an assignee in bankruptcy."

Possibly, it was conceded, the difficulties arising from the difference in the periods of limitation and the difference in the rule as to survival might be obviated in practice by holding the statute a bar to so much of the damages as would be outlawed, and, in case of death, by permitting a revival of the action so far as it related to the property. But the court did not see how it would be practicable to deal with a case where the right of action had passed to a trustee in bankruptcy without treating it as an independent cause.²³ Therefore, for reason of the great difference between the rules of law applicable to the two classes of injuries, the conclusion was that they

²³ See *In re Haensell*, 91 Fed. 355 (1899); *Rose v. Buckett*, L. R. (1901) 2 K. B. 449; *Sibley v. Nason*, 196 Mass. 125 (1907).

constituted different causes of action, although resulting from the same tortious act, and the judgment was reversed.²⁴

The procedural difficulties referred to by the court, while no doubt serious, are such as daily occur in other branches of the law where rules of convenience alone would hardly be regarded as a sufficient guide in the definition of substantive rights. There is no greater hardship, for example, in compelling the owner of a chose in action to sue for his entire demand before assignment, where a part of the chose is and a part is not assignable, than in requiring him, at law, to sue on the whole demand without assigning a part, where it is all assignable. Since the foregoing decision it has been held by the appellate division of the Supreme Court of New York that injuries to the person and property of the plaintiff resulting from a single negligent act, while constituting separate causes of action, may be joined in the same complaint, and the dictum of Cullen, *J.*, apparently to the contrary, is explained.²⁵ But they cannot be pleaded in a single count and the plaintiff will be required to state and number them separately.²⁶

In contrast with these rulings is a still more recent case where the question certified to the Court of Appeals for decision was, whether it was proper for the plaintiff to plead in his complaint as one cause of action, facts constituting negligence at common law as well as under the Employer's Liability Act of New Jersey and the Federal Employers' Liability Act.^{26a} The answer was in the affirmative.

²⁴ Accord: *Watson v. Texas & P. R. Co.*, 8 Tex. Civ. App. 144 (1894) s. c. 27 S. W. 924. Action for personal injuries sustained by owner of horses while travelling with them on a drover's pass, not barred by judgment for the injury received by the horses in the same accident. *Lamb v. Harbaugh*, 105 Cal. 680 (1895). Complaint alleging trespass on real estate by which property was damaged, plaintiff intimidated and health impaired held to show a misjoinder of distinct causes of action. See also *McCarty v. Freemont*, 23 Cal. 196 (1863).

²⁵ *McQuerney v. Main*, 82 N. Y. App. Div. 543 (1903); *Egan v. N. Y. Transportation Co.*, 39 N. Y. Misc. 111 (1902); *Doyle v. American Wringer Co.*, 60 N. Y. App. Div. 525 (1901). The two causes of action must arise out of the same transaction. *Campbell v. Hallihan*, 45 N. Y. Misc. 325 (1904), and see *Lanning v. Galusha*, 135 N. Y. 239 (1892).

²⁶ *Powers v. Sherin*, 89 N. Y. App. Div. 37 (1903); *Vock v. Auterbourg*, 66 N. Y. Misc. 222 (1901). A count for assault and battery cannot be joined with a count for refusing to furnish gas under a contract. *Hochman v. New Amsterdam G. Co.*, 73 N. Y. Misc. 453 (1911), s. c. 133 N. Y. S. 386.

^{26a} *Payne v. N. Y. S. & W. R. Co.*, 201 N. Y. 436 (1911).

"Suppose the plaintiff proves them all? Does that establish three distinct rights in the plaintiff, or three independent wrongs against the defendant; or support three separate recoveries? Obviously there is but one primary right, one primary wrong and one liability. The single wrong has given rise to a single right, which may be established by as many different facts as the nature of the case may justify or demand."

Here it may be permissible to quote the naive remark of the court. "There are times when nothing is more troublesome than the simplicity of our Code pleading, although in the main it works out for good."

The weight of American authority disagrees with the judgment in *Brundsen v. Humphrey*, preferring to regard a single act causing injury as giving rise to a single cause of action, whether or not the act infringes upon different rights or causes different injuries. In Massachusetts, a count in a declaration averred that the defendant so negligently managed his steamboat as to run down the plaintiff's sailboat, whereby it was rendered useless. A second count recited that the plaintiff was thrown into the water and injured in his person. It was held that the two counts were for the same cause of action and that the plaintiff could not have divided the tort and had one action for the injury to his person and another for the injury to his property.²⁷ The principle is reaffirmed in *Braithwaite v. Hall* ²⁸ by Mr. Justice Holmes. "The single collision which caused the damage to the plaintiff's person and to his bicycle was one cause of action. *Un trespasse ne serra mye deux foitz puny*, Y. B., 5 Edw. II, 134, 135."

A decision that has had a wide influence is *King v. Chicago M. & St. P. Railroad Co.*²⁹ In this case the plaintiff while driving his wagon across the defendants' tracks was run into by a train. He brought an action for his personal injuries and secured a judgment in his favor. While that action was pending on appeal he brought an additional action to recover for the injury to

²⁷ *Doran v. Cohen*, 147 Mass. 342 (1888); *Johnson v. Holyoke*, 105 Mass. 80 (1870).

²⁸ 168 Mass. 38 (1897). *Bliss v. N. Y. C. & H. R. Co.*, 160 Mass. 447 (1894) recognizes the principle, but the question involved was the validity of a release alleged to have been obtained fraudulently. Followed in *Yaple v. N. Y. O. & W. R. Co.*, 57 N. Y. App. Div. 265 (1901).

²⁹ 80 Minn. 83 (1900); s. c. 50 L. R. A. 161.

the horse, wagon and harness. As a defence the judgment in the former action was pleaded as a bar and later, by amendment, its payment was pleaded. A verdict for plaintiff was sustained by the court below on the theory that at the common law and under the constitution the right of personal security was distinct from the right of private property. On appeal judgment was reversed, the court adopting the Massachusetts view and that expressed by Chief Justice Coleridge in preference to the majority opinion in *Brunsdon v. Humphrey*.

"We are of the opinion that the cause of action consists of the negligent act which produced the effect, rather than in the effect of the act in its application to different primary rights, and that the injury to the person and property as a result of the original cause gives rise to different items of damage. The natural rights mentioned in the constitution and statutes are of a personal character, all centering in the person; and the enactments referred to are intended to preserve them under the various phases of life, in the most practicable manner, as viewed by the legislature. But because the distinction in reference to personal and property rights has been made, it does not follow that those statutes were intended to definitely provide for separate remedies under the circumstances presented in this case. * * * The views we have adopted seem to us more in harmony with the tendency toward simplicity and directness in the determination of controversial rights."

The court refused to accept the reasoning of *Skoglund v. Minneapolis St. Ry. Co.*,³⁰ as applicable to the facts before them, and indicated that the rule there applied would not be extended. In that case, the plaintiff and his wife having been injured by the same act of negligence, the plaintiff, after recovering for his personal injuries, was permitted to bring a separate action for the loss of services of his wife. Upon this point also the courts have expressed discordant views.³¹

³⁰ 45 Minn. 330 (1891) criticised in Freeman on Judgments §241.

³¹ Compare *Todd v. Redford*, 11 Mod. 264 (1709); *Newbury v. Conn. & P. R. Co.* 25 Vt. 377 (1853); *Brackett v. Fallon*, 76 Atl. Rep. 558 (N. J. 1911) with *Cincinnati H. & D. R. Co. v. Chester*, 57 Ind. 297 (1877); *Hazard P. Co. v. Volger*, 3 Wyo. 189 (1888); *Birmingham S. R. Co. v. Linter*, 141 Ala. 420 (1904); *Consolidated T. Co. v. Whelan*, 60 N. J. L. 154 (1897); *Owensboro & H. G. R. v. Coons*, 20 Ky. L. Rep. 1678 (1899). See also, *Hamlin v. Tucker*, 72 N. C. 502 (1875); *Donoghue v. Consolidated T. Co.*, 201 Pa. 181 (1902). In *Pennsylvania R. Co. v. Bock*, 93 Pa. 428 (1880) a statutory claim for damages for the death of a son and a claim for the loss of a horse killed at the same time were joined in the same declaration.

Recent decisions in New Jersey, Mississippi, Alabama and North Carolina³² are in harmony with *King v. Railroad*. In Kentucky a recovery by a personal representative for the killing of his intestate was held to bar a subsequent action for the killing of the horse in the same accident.³³ But the sound rule would seem to be to permit two actions where the funds arising from a recovery are distributable to different classes of persons, and where two judgments are necessary in order that the funds may be kept separate.³⁴

The conflict of authority is briefly referred to in a recent case in the Superior Court of Pennsylvania³⁵ where the plaintiff sought damages for bodily injuries inflicted by defendant's employees in ejecting her from a house. The defendant offered in evidence the record of a prior action to recover damages for injuries to her furniture which had been marked settled and discontinued. The authority of the attorney to settle the case was disputed and the case went to the jury on that point; besides which, the defendant had gone to trial on the general issue, without pleading *lis pendens*. What would have been the effect of a judgment in a prior action supplemented by proof that the injuries in both actions resulted from the same wrongful act is not decided.³⁶

In jurisdictions where it is maintained that injury to person

³² *Ochs v. Public Service R. Co.*, 80 N. J. L. 148 (1910); *Kimball v. Louisville & N. R. Co.*, 94 Miss. 396 (1908); *Birmingham S. R. Co. v. Lintner*, 141 Ala. 420 (1904); *Eller v. Railroad*, 140 N. C. 140 (1905).

³³ *Coles v. Ill. Cent. R. Co.*, 120 Ky. 686 (1905).

³⁴ *Peake v. Baltimore & O. R. R. Co.*, 26 Fed. 495 (1886); *Barnett v. Lucas*, Irish Rep. 6 C. L. 247 (1872). A judgment recovered by partners for the defendant's negligence in having damaged the firm horse and wagon in a collision is not a bar to a subsequent action by one of the partners for personal injuries sustained in the same accident. *Taylor v. Manhattan R. Co.*, 53 Hun. 305 (1889); *Carman v. Metropolitan S. R. Co.*, 35 N. Y. Misc. 127 (1901). And see *Taylor v. Metropolitan R. Co.*, 52 N. Y. Super. Ct. 299 (1885).

³⁵ *Henry v. Lilley*, 42 Super. Ct. 565 (1909).

³⁶ The usual practice in Pennsylvania is to claim damages for the injuries both to person and property in the same statement of claim. See forms in *Brewster's Practice* (2 ed.) Vol. II, p. 1548, §3755v; p. 1560, §3765. This accords with the precedents in Chitty where damages for both classes of injuries are declared for in a single count. *Chitty on Pleading* (16 Amer. ed.) Vol. II, pp. 574, 581. See also the pleadings in *Williams v. Holland*, 10 Bingh. 112 (1833); *Burgess v. Gray*, 1 C. B. 578 (1845); *Peachey v. Rowland*, 13 C. B. 182 (1853); *McDonald v. Snelling*, 96 Mass. 290 (1867); *Parker v. Burgess*, 64 Vt. 442 (1892). For the modern English statement see note 20, *supra*.

and property by a single act constitutes but one wrong, it would seem logical to include a recital of the whole matter in a single count.³⁷ But even if the injuries be regarded as constituting distinct causes of action so that separate counts might be maintained therefor, their joinder, at most, would violate only the rule against duplicity in pleading, which, being a defect in form merely, cannot be taken advantage of except by special demurrer.³⁸

It may well be that the discussion of this subject is rendered more difficult by the vague manner in which the expression "cause of action" is used. But the true meaning of this term is in itself a source of difficulty, and efforts to give it a precise definition have not always proved successful. It has been said: "A right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant. The facts which establish the existence of that right and that delict constitute the cause of action."³⁹ So, Lord Esher defines a cause of action as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."⁴⁰ But a more restricted use of the term is required in the interpretation of statutes using "cause of action" in a sense evidently limited to the act or delict on the part of the defendant which gives the plaintiff his right of action; for example, in statutes relating to venue of actions or the statute of limitations.⁴¹ "No doubt," said Baron Pigott, "to make the act or omission complained of a cause of

³⁷ Hazard P. Co. v. Volger, 3 Wyo. 189 (1888); Lamb v. St. Louis C. W. R. Co., 33 Mo. App. 489 (1888); People's Nat. B. v. Nickerson, 106 Me. 502 (1910); Howe v. Peckham, *supra*, and preceding note.

³⁸ Chicago W. D. R. Co. v. Ingraham, 131 Ill. 659 (1890). Or by motion to paragraph the complaint, Pittsburgh C. C. & St. L. R. Co. v. Carlson, 24 Ind. App. 559 (1899).

³⁹ Prentice, J., in Pavelka v. St. Albert Soc., 82 Conn. 146 (1909). Pomeroy's Code Remedies (4 ed.) 460, §347; Hayes v. Clinkscales, 9 S. C. 441 (1875); Veeder v. Baker, 83 N. Y. 156 (1880); Post v. Campau, 42 Mich. 90 (1879).

⁴⁰ Read v. Brown, L. R. 22 Q. B. 128 (1888). See Allhausen v. Margarejo, L. R. 3 Q. B. 340 (1868). "*Action nest autre chose que loyall demand de son droit.*" Mirror, Chap. 2, Sec. 1.

⁴¹ Jackson v. Spittall, L. R. 5 C. P. 542 (1870). "The misconduct of the defendant is the gist of the action." Per Bayley, J., in Howell v. Young, 5 B. & C. 259 (1826); Williamson v. Chicago R. I. & P. Co., 84 Ia. 583 (1892); Clarke v. Ohio R. Co., 39 W. Va. 732 (1894).

action, a contract must have preceded, but so also a negotiation must have preceded the making of the contract; yet I should not include in the expression *cause of action* that negotiation, or any of the other circumstances that might form part of the necessary evidence in the cause as the groundwork of the cause of complaint, but only the cause of complaint itself, that is the breach.”⁴² It has also been said that there are cases where the different grounds of liability have been referred to as causes of action when in fact there has been but a single cause of action which could be established by evidence appropriate to each of the grounds upon which the liability is predicated.⁴³ At best, the colloquial use of the term is ambiguous, its scientific use complex.

The infallible test, it is said, to determine whether a complaint states more than one cause of action, is to discover whether there is more than one primary right invaded. “If two separate and distinct primary rights could be invaded by one and the same wrong, or if the single primary right should be invaded by two distinct and separate legal wrongs, in either case two causes of action would exist.”⁴⁴ *King v. Railroad*, holds that the cause of action exists in the wrongful act, rather than in the effect of that act in its application to primary rights. But this dictum concedes more than is necessary to the decision, which does not in itself involve a rejection of Mr. Pomeroy’s test, if the primary right be regarded as the right to be unmolested, the molestation the primary wrong and the injury to person and property the consequence of that wrong. This theory and the theory in *Brunsdon v. Humphrey* are in irreconcilable conflict as to the sense in which the word *primary* shall be used; indeed, the problem becomes one of dialectics, in which the disputants are reasoning in the different categories of time and space.

The taxpayer remains for consideration. Litigation is, to him at least, an expensive luxury, for of the cost of maintaining the courts, of the salaries of the judges and fees of the jurors he

⁴² *Durham v. Spence*, L. R. 6 Exch. 46 (1870); *Hosley v. Insurance Co.*, 86 Wis. 463 (1893); *Bach v. Brown*, 17 Utah, 435 (1898).

⁴³ *Payne v. N. Y. S. & W. R. Co.*, 201 N. Y. 436 (1911).

⁴⁴ *Pomeroy’s Code Remedies* (4 ed.) 467, §350; *Herman v. Felthusen*, 114 Wis. 423 (1902); *Adkins v. Loucks*, 107 Wis. 587 (1900).

pays a share out of proportion to that borne by the actual litigants. *Interest reipublicae ut sit finis litium*. Every hour spent in court by parties and witnesses is, in a sense, wasted time; and, while the insistence upon legal rights is a mark of self respect, litigiousness as a habit easily develops into a vice. Therefore when a litigant has had his day in court, he ought not to be encouraged, by subtle distinctions, to a renewal of the contest in a different form; particularly if he knew, or could have known, the extent of his injury. If in rare instances it is found that a meritorious claim has been overlooked, the hardship is no greater than in the case where a plaintiff has wholly mistaken his cause of action and takes nothing by his writ. It may be that this procedure is archaic; that an injured person ought not to be compelled at his peril to buy the right writ or elect a "theory of action," as he would select a card from a juggler's pack; and that upon a narrative of the facts the responsibility both for the remedy and relief should rest upon the agencies of government. But a society already overburdened with duties growing out of a rapidly developing social consciousness would hardly welcome, in all its phases, this additional responsibility in matters that for centuries have been attended to, whether well or ill, through individual initiative. Indeed, outside of fiction, little sympathy is wasted on the unsuccessful litigant who, presumably, has made a poor choice of advisers and will do better another time.

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